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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 HARVEY G. OTTOVICH REVOCABLE
11 LIVING TRUST DATED MAY 12, 2006,
12 HARVEY OTTOVICH AS TRUSTEE FOR
13 THE HARVEY G. OTTOVICH
14 REVOCABLE LIVING TRUST DATED
MAY 12, 2006, MARK OTTOVICH AS
SUCCESSOR TRUSTEE FOR AND
BENEFICIARY OF HARVEY G. OTTOVICH
REVOCABLE LIVING TRUST DATED
MAY 12, 2006.

No. C 10-02842 WHA

ORDER DENYING DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiffs,

V

18 WASHINGTON MUTUAL INC., CHASE
19 HOME FINANCE, LLC, JP MORGAN
20 CHASE BANK NA, AN ACQUIRER OF
CERTAIN ASSETS AND LIABILITIES OF
WASHINGTON MUTUAL BANK FROM
FEDERAL DEPOSIT INSURANCE
CORPORATION ACTING AS RECEIVER,
21 DOES ONE THROUGH 50, INCLUSIVE,

Defendants.

24 Defendants move to dismiss plaintiffs' second amended complaint on two grounds.

25 *First*, they argue that plaintiffs the Harvey Ottovich Trust and Mark Ottovich cannot proceed
26 *in propria persona*. Subsequent to the filing of defendants' motion, however, Attorney Norman
27 Newhouse has appeared on behalf of these plaintiffs (*see* Dkt. Nos. 52 and 54). Norman
28 Newhouse was previously ineligible to practice law but has since become eligible to practice
again. Plaintiffs pointed this out in their opposition, but defendants neglected to file a reply in

1 support of their motion. The appearance of Attorney Newhouse on behalf of these plaintiffs
2 resolves the first ground for defendants' motion.

3 *Second*, defendants argue that plaintiffs' claim for intentional infliction of emotional
4 distress fails to state a claim upon which relief can be granted. This is plaintiffs' ninth claim.

5 Prior orders have addressed the standard for stating a claim for intentional infliction of
6 emotional distress. An order granting in part and denying in part a motion to dismiss
7 plaintiffs' first amended complaint stated:

8 Plaintiffs' ninth claim against defendants is for intentional infliction of
9 emotional distress. To state a claim for this tort, a party must allege
10 (1) outrageous conduct, "so extreme as to exceed all bounds of that usually
11 tolerated in a civilized community," (2) an intent to cause or a reckless disregard
of the possibility of causing emotional distress, (3) severe or extreme emotional
distress, and (4) that the outrageous conduct proximately caused the emotional
distress. *Symonds v. Mercury Sav. & Loan Ass'n*, 225 Cal. App. 3d 1458, 1468
(1990).

12 Plaintiffs' amended complaint is insufficient under *Iqbal* and *Twombly*.
13 Plaintiffs' amended complaint lacks specific facts describing the severe emotional
14 distress suffered, let alone that defendants' conduct proximately caused this
distress. Plaintiffs merely assert legal conclusions that they suffered severe
15 emotional distress as a result of the conduct of defendants. Furthermore,
plaintiffs also failed to allege sufficient facts to establish intent by defendants to
inflict emotional distress.

16 Accordingly, plaintiffs' claim for intentional infliction of emotional distress was dismissed
17 with leave to amend (Dkt. No. 30). Plaintiffs sought leave to file a second amended complaint.
18 Leave was granted, because — as to the emotional distress claim — "[p]laintiffs' proposed
19 second amended complaint add[ed] facts concerning [this claim, and defendants do not oppose
20 leave to file]" (Dkt. No. 38).

21 Now, however, defendants move to dismiss this claim because, they state, plaintiffs
22 have not pled outrageous conduct by defendants. Plaintiffs' second amended complaint states,
23 among other things (Dkt. No. 47):

24 87. Plaintiff Harvey Ottovich suffered from posttraumatic stress disorder as a
25 result of combat, during the Vietnam War. His disability caused him in
the spring of 2009 to to [sic] be bedridden and medication for acute
26 anxiety and disability [sic].

27 88. Defendants' act of not checking to see if plaintiff had home insurance (he
28 did) and charging expensive extra insurance to the plaintiff was an
intentional act in conscious disregard of the rights of the plaintiff. . . .

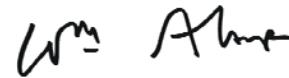
- 1 89. Defendants' act of suspending plaintiffs' mortgage payments and refusing
2 to credit those payments and charging a late fee was an intentional act in
conscious disregard of the rights of plaintiff. . . .
- 3 90. Defendants' act of threatening to foreclose on the family home or to
4 accelerate the loan if a certain amount was not paid was an intentional act
in conscious disregard of the rights of the plaintiff. . . .
- 5 91. Defendants' act of not following its own internal procedures, legal
6 requirements and further mishandling the foreclosure plaintiff's home was
an intentional act in conscious disregard of the rights of the plaintiff. . . .
- 7 92. As a result of the above acts of the defendants, Plaintiff Harvey Ottovich
has suffered severe emotional distress.

8 This order cannot say that "defendant[s'] conduct, as pleaded, could not be deemed
9 'outrageous.'" *Ricard v. Pac. Indem. Co.*, 132 Cal. App. 3d 886, 895 (1982). That issue will
10 need to be considered after the facts are developed in discovery. In the meantime, plaintiffs
11 have stated a claim for intentional infliction of emotional distress.

12 For the foregoing reasons, defendants' motion to dismiss is **DENIED**, and the hearing on
13 the motion on January 27, 2011, is **VACATED**.

15 **IT IS SO ORDERED.**

17 Dated: January 18, 2011.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE